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State of Utah v. Danilo Pascual : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 900274-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900274-CA
v.	:	
DANILO PASCUAL,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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THIS IS AN APPEAL FROM A CONVICTION OF CRIMINAL HOMICIDE, MURDER IN THE SECOND DEGREE, A FIRST DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No.900274-CA
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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1990), as the appeal was transferred from the Utah Supreme Court on May 18, 1990.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the trial court committed plain error when it failed to give an eyewitness identification jury instruction. The requirements for finding plain error, as contained in State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, Eldredge v. Utah, 110 S.Ct. 62 (1989), are 1) that the error be obvious to the trial court, and 2) that the error be harmful.

2. Whether trial counsel provided ineffective assistance when he 1) failed to request an eyewitness jury

instruction, 2) failed to object to a jury instruction negating a self-defense justification, and 3) pursued a certain theory of the case and abandoned a certain line of questioning. The test for determining whether counsel's conduct was constitutionally infirm, as contained in State v. Pursifell, 746 P.2d 270, 275 (Utah Ct. App. 1987), is 1) whether counsel's performance fell below an objective standard of reasonable professional judgment, and 2) whether counsel's performance prejudiced defendant. The standard for reviewing the wording of jury instructions is whether the trial court abused its discretion. State v. Aly, 782 P.2d 549, 550 (Utah Ct. App. 1989). The choice of which jury instruction the trial court gives is a legal conclusion which is reviewed under a correctness standard. State v. Mitchell, 779 P.2d 1116, 1123 (Utah 1989).

3. Whether the trial court abused its discretion and committed prejudicial error when it refused to admit evidence of a fire allegedly set to defendant's house two days after the homicide. The standard of review is whether the court abused its discretion in denying admission of the evidence, and whether any error was harmful. State v. Larsen, 775 P.2d 415, 419 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

STATEMENT OF THE CASE

On June 27, 1988, defendant was charged with one count of criminal homicide, murder in the second degree, a first degree

felony, in violation of Utah Code Ann. § 76-5-203 (1990) (Record [hereinafter R.] at 1). Gary Gale originally appeared as counsel for defendant but withdrew and Robert Phillips substituted as counsel at the time of the preliminary hearing (R. at 12).

An October 31, 1988, trial setting was continued by stipulation of the parties (R. at 62). The matter came on for trial by jury on December 6, 7 and 8, 1988, in the Second Judicial District Court for Weber County, the Honorable Stanton M. Taylor, district judge, presiding (R. at 65-68). During trial, defendant attempted to introduce evidence of a fire which allegedly occurred at defendant's house two days after the homicide with which defendant was charged (Transcript [hereinafter T.] at 311). Counsel for the State objected and, after an in-chambers discussion, the court sustained the objection (T. at 316). The court determined that the probative value of the evidence of a fire, which the court described as "limited," was substantially outweighed by its unduly prejudicial nature (T. at 315-16). Defendant did not ask the court to instruct the jury on eyewitness identification. It is unclear whether defendant objected to the instructions prior to their being given to the jury. There is a brief allusion to the instructions in the transcript, but any discussion of the final form of the instructions is not provided (T. at 576-78). After the jury was instructed, defense counsel said that he had no challenges to the jury instructions (T. at 624).

At the conclusion of the trial, the jury found defendant guilty as charged (R. at 109 and 159). On January 3,

1989, the court sentenced defendant to a term in the Utah State Prison of not less than five years and which may be for life, with a consecutive one year enhancement for use of a firearm. The court also ordered defendant to pay restitution (R. at 123-24).

On February 17, 1989, defendant filed a pro se notice of appeal (R. at 131). By stipulation, the case was remanded from the Utah Supreme Court to allow resentencing of defendant in order for a timely notice of appeal to be filed (R. at 136-40). Defendant was resentenced on August 28, 1989, and filed a notice of appeal from that resentencing on September 19, 1989 (R. at 148-51). The appeal was transferred to this Court from the Utah Supreme Court on May 18, 1990.

STATEMENT OF THE FACTS

In June of 1988, Todd Salazar, his girlfriend, Natalie Chase, and their infant son, T.J., lived in a house on 33rd Street in Ogden, Utah (T. at 91-92 and 97). Todd worked during the day as a bricklayer, and Natalie worked nights at the Nice Corporation; they shared baby tending chores, each caring for the child when the other was at work (T. at 93-94). On Friday, June 24, 1988, Todd got home from work at 3:30-4:00 p.m. and Natalie left for work at 9:30 p.m. (T. at 97). When Natalie returned from work at 2:30 a.m., she went next door to a birthday party, leaving Todd and T.J. at home (T. at 98-99). The child was asleep and Todd and a friend were up watching television until approximately 4:30 a.m., when Natalie came back from the party (T. at 99). The two went to sleep for about three hours, awakening at about 9:00 a.m. (T. at 100).

Natalie decided to go boating with family members about noon on Saturday, June 25, 1988. Todd stayed home because he was tired (T. at 100). T.J. was taken to Todd's parents' home; Todd was sleeping on the couch in the front room when Natalie left (T. at 101). Todd was wearing a hat and cut-off sweat pants with no shirt, shoes or socks when Natalie last saw him (T. at 104). The sweat pants had a small pocket in the back which would hold very little (T. at 105).

Approximately 8:00 p.m. on June 25, 1988, two 18-year olds, Jerry Garza and Jaime Gomez, were visiting a friend in a house near defendant's home (T. at 116 and 492). Neither was related to Todd Salazar; both knew him, although not well (T. at 115 and 187). Todd was three or four years older than they (T. at 115). Jerry and Jaime decided to drive to a convenience store (T. at 116-17 and 176). As they passed defendant's home, Franklin and Lawrence Lucero and two friends were sitting on defendant's porch. The Luceros recognized Jaime and Jerry and began yelling at them (T. at 117 and 176). There had been bad blood between Jerry and the Luceros prior to that night (T. at 182). As Jerry and Jaime drove by, Lawrence remembered that Jerry had beaten up one of Lawrence's cousins. Lawrence began shouting at Jerry, calling him names and telling him to stop and fight (T. at 447). Jerry and Jaime just drove on by (T. at 117 and 176).

Jerry and Jaime returned from the store, again driving past the Luceros and their friends at defendant's house (T. at 118-19 and 177). Lawrence called out to Jerry and Jaime, telling

them to stop and calling them out to fight (T. at 119-20 and 177). Jerry and Jaime felt outnumbered by the Luceros and their friends, so they went on to Jaime's uncle's house and told the three men there that the Luceros wanted to fight (T. at 119-20 and 177-78). Jerry and Jaime asked Jaime's two uncles and their friend to return with them to back them up in a fight with the Luceros (T. at 120, 155, 178 and 204). Jerry left to drop off the car and asked four or five other friends at another house to come to the fight as well (T. at 178). At that point no one in Jerry and Jaime's group had any weapons (T. at 178).

As the nine or ten people with Jerry and Jaime approached the open field near defendant's house, they saw people jumping off of defendant's porch and going to their cars (T. at 120). Jerry saw one of Lawrence's friends go to Lawrence's car, "[get] into the trunk," then walk over to Lawrence (T. at 179-80). When he saw this, Jerry assumed that Lawrence was then armed with a knife or a pipe (T. at 180). Jerry went to his car and got out a knife and another friend got a bat (T. at 180). Jerry walked toward the field with the knife held behind his back (T. at 181). Evidently, others in the neighborhood became aware of the pending fight and gathered at the field (T. at 233 and 269-70).

As Jerry and Jaime walked toward the Lucero group, they were met by Lawrence and Franklin Lucero and two of their friends, Ranaldo Hain and Crisostomo Mendoza (T. at 120, 411 and 469). At this point, defendant was in his house. He heard the noise of the groups calling each other on, and looked out to see

his four friends walking toward a group of ten others (T. at 494-96). Defendant did not know any of the ten but saw a knife and a bat; he decided to get his sawed-off shotgun from the closet (T. at 497-500). Defendant said that he took the gun and one shell out to stop the fight and scare off the group opposing his friends (T. at 500-501). It is clear from the testimony that neither Todd, Jerry, Jaime, or any of their friends knew defendant, who was some fifteen years older than they (T. at 145, 159, 197, 239-40, 271 and 519). Defendant did not know Todd, although defendant's friend, Lawrence Lucero, did (T. at 501-502 and 415-16).

While defendant was in his house getting his shotgun, the Luceros and their friends were standing in the nearby open field egging Jerry and Jaime on, calling them on to fight (T. at 183). The verbal taunts were boiling down to a one on one fight between Lawrence and Jerry, with their friends and other onlookers urging them both to drop their weapons and fight hand to hand (T. at 121, 158-59, 184, 236 and 451). It is at this juncture that the evidence produced by the State and that produced by defendant diverges. The prosecution's witnesses placed Todd Salazar across the street on the porch and lawn of his own home until defendant and his friends crossed the street and began beating him. Defendant's witnesses said that Todd walked across the street and joined in the fight in the open field. The State's version of the evidence follows first.

During the verbal sparring between the Luceros and Jaime and Jerry, Jon Martinez left the field and walked across

the street to talk to the victim, who was sitting on the porch of his home, smoking (T. at 206-207). Martinez had just come to watch the fight and went over to ask Todd if Todd was going to come to watch, too (T. at 207). Todd answered that he wasn't, saying he had something cooking and would stay at his house (T. at 207-208). Martinez walked back to the corner of the street and listened to the two groups in the field argue (T. at 208).

When the two factions were arguing in the field, urging Jerry and Lawrence to fight without weapons, Lawrence said that his group did not have weapons (T. at 159). At that point, Jaime's uncle, Rumaldo Gomez, spied defendant, who was walking from his house and up to the Luceros through the bushes (T. at 159-60). Rumaldo saw that defendant had his hand behind his back and said that defendant had a gun (T. at 160-61). Defendant pulled the gun out, cocked it, and said "[Y]eah, . . . I got a gun" (T. at 161). Defendant pointed the gun at Rumaldo and Johnny Gomez, who immediately turned and ran across the street, in the direction of the victim's house (T. at 161-62, 169, 184-85, 210, 239-40, 275-76, and 507). The whole crowd began to run from defendant, escaping down the street, through Todd's yard, running in every direction (T. at 125, 277 and 507). No punches were thrown until after the gun was displayed and defendant and his friends had chased the others across the street to Todd's house (T. at 122, 127, 210-11 and 240-42).

As the Gomezes and the neighborhood boys ran from defendant down the alley near Todd's house, they saw Todd for the first time (T. at 123, 126, 187, 233-35, 241-42, and 277). Todd

stood at his house, looking confused as all the young men ran past (T. at 242).

Jaime Gomez, running from defendant, had crossed the street and reached the corner of Todd's carport when Todd stepped off of his porch (T. at 127). Two of the men from the Lucero group, Cris Mendoza and defendant, ran across to where Todd was, near the porch, and began to kick and hit him (T. at 127, 212, and 242). Todd tried to defend himself by hitting back (T. at 212). When Jaime saw the two men fighting with Todd, he turned back to help him. Jaime hit one of the men and Todd started running toward his house (T. at 128). Cris Mendoza originally was fighting "toe-to-toe" with Todd when defendant came up behind Todd and hit Todd with the gun (T. at 128-29). Todd had a set of car keys in his hand; he did not have a knife (T. at 129). Jaime ran back to where defendant, Cris, and Todd were fighting and struck either defendant or Cris with his fist; Todd ran toward his house. Todd had not reached the porch when defendant or Cris jumped him again. At that point, Jaime noticed the gun and warned Todd about the weapon (T. at 130).

Jaime ran toward the alley with Todd right behind him. This path lead them to the carport and away from defendant and the gun (T. at 130-31). Jaime got around Todd's car in the carport, and turned to see that defendant and Cris were no more than five feet behind Todd (T. at 131). Jaime saw defendant point the gun at Todd's back; Jaime turned to run again and heard a shot. Jaime looked back and saw Todd fall. Jaime ran to the alley where he told the others who had run that Todd had been

shot; everyone ran back from the alley (T. at 132). When Jaime came out of the alley, he saw Todd lying on the ground with a hole in his back, and Cris and defendant moving back across the street (T. at 133). Jaime tried to help Todd but nothing could be done (T. at 134).

Others who had run from defendant saw defendant and Cris attack Todd and Todd try to defend himself. They could see that Todd did not have any weapons and that he had no pockets in which to conceal a weapon (T. at 212). Jonny Martinez heard the shot as he ran toward where Todd was fighting with defendant. At the sound, Martinez looked up to see Todd fall forward on his face (T. at 213). Defendant then walked up to where Todd lay, called him an "F'ing punk," and hit Todd on the right forehead with the gun. Defendant then ran back across the street (T. at 214-25). Martinez told his friends to call an ambulance, then tried to keep Todd breathing until authorities arrived (T. at 216-17).

One witness who was not involved in the argument at the open field next to defendant's house was Marcy Rodriguez. She lived next door to Todd and saw him standing on his front porch while the argument was going on across the street from her house (T. at 279-80). She never saw Todd cross the street to the argument (T. at 282). She did see that the argument never turned to blows, "They just argue" (T. at 281). She saw the men (defendant and Cris) chasing the boys across the street to the corner where Todd lived (T. at 281 and 535-36). She also could see defendant's gun as he crossed the street (T. at 282).

When the police officers arrived, they found Todd lying near his car with a wound in his back (T. at 287). A search of the area turned up no weapons (T. at 287 and 298). Natalie Chase's father received word about 9:30 p.m. that Todd had been shot (T. at 302). He went to Todd's house where he saw the outer door standing ajar; he entered and found food on the coffee table in the front room, and the television set on (T. at 303). He turned off the television and secured the house (T. at 304).

Officers were directed to defendant's house by the young men at Todd's house. They performed a consent search and found no one and no weapon in the house (T. at 292-93). Some three hours later, after defendant surrendered himself at the police station, officers returned to defendant's home and found an eight inch knife in a garbage can outside of the house, and a twenty to twenty-four inch 2 x 2 thrown under a truck in defendant's driveway (T. at 299-300 and 307-308). The officers never located the shotgun used by defendant (T. at 309).

At the time he was shot, Todd was wearing only cut-off sweat pants, underpants, and athletic shoes (T. at 377). The gunshot wound in Todd's back showed stippling from the gunpowder, and the wad and about forty pellets from the shell were found in Todd's chest cavity (T. at 328 and 381). Expert testimony established that the muzzle of the gun was approximately two to three feet from Todd's back when the shot was fired (T. at 382, 393 and 570). The wound was seven and three quarter inches from the base of Todd's neck and slightly to the right of the middle of his back (T. at 378). The shot traveled from the right back

to the left chest, passing through the left lung and portions of the heart (T. at 380). The wound and trajectory were consistent with a shot fired horizontally as Todd was turning away (T. at 382 and 394). Todd had abrasions above the right eyebrow, consistent with Martinez's testimony that defendant hit Todd with the shotgun after Todd was lying on the ground (T. at 383, 385 and 215). Todd had other fresh injuries, consistent with the testimony of being kicked and punched prior to the time he was shot (T. at 384-89, 127-28, 211-13 and 242-43).

The autopsy also showed that Todd had a blood alcohol content of .04 milligrams percent; this was consistent with having consumed "a little more than half a can of Utah beer." (T. at 397). Todd also had a quantity of cocaine and its metabolite in his blood and urine. The blood amounts were "fairly low" and the urine amounts higher. Based on that, the medical examiner concluded that ingestion of the cocaine had taken place "at least hours before [Todd's] death" (T. at 398). He testified that the alcohol and the cocaine would work against each other in their effects because alcohol is a depressant and cocaine is a stimulant (T. at 398-99).

In sometimes confusing and contradictory testimony, defendant and his friends painted a different picture of Todd's involvement that evening. Defendant's friend, Ranaldo Hain, said that the Lucero brothers, Ranaldo, and another friend, Crisostomo Mendoza, faced a crowd of twenty or more (T. at 409 and 411). Lawrence Lucero told the group that he just wanted to fight Jerry Garza (T. at 412). Just then, someone threw a beer can at

Crisostomo (Cris), and defendant and Cris began fighting with the victim and the person who threw the can (T. at 412). Ranaldo said that Todd was with the person who threw the can, on the sidewalk at the street corner next to the open field during the argument (T. at 412-13). As the four fought, defendant pulled up the gun, loaded it, and the other boys began running (T. at 413). Ranaldo and Lawrence stayed on 33rd Street as the fight somehow moved across the street to Todd's house (T. at 414-18). As the fight continued at Todd's house, Martinez told Lawrence, "that's Todd, and Lawrence said -- then Lawrence recognized him and was going to try to break it and then the gun went off." (T. at 415). Todd was Lawrence's friend (T. at 415-16). When the shotgun went off, Todd was trying to get into his car; Ranaldo thought that this explained the fact that Todd was shot in the back (T. at 417).

On cross-examination, Ranaldo gave a confusing account of where and how the fight started. His identification of Todd as the person standing on the sidewalk when the beer can was thrown was tenuous. The following exchange between the prosecutor and Ranaldo occurred:

> Q [By Mr. Richards] Okay. But Todd -- you remember seeing Todd Salazar standing there?
> A He was -- yeah, he was standing next to that guy [the one who had thrown the can].
> Q Now, do you know Todd Salazar?
> A I seen him before, but I didn't remember him that day.
> Q Okay. But you remember him now and that was the person standing there?
> A Yeah.

(T. at 431). The testimony was also confusing about where Ranaldo was standing and the movements of the groups just before

and during the fight (T. at 431, 433, 435, 436 and 438). It is also confusing about when Ranaldo first saw defendant's gun, and when, in the course of the fight, defendant loaded it (T. at 432-38).

Lawrence Lucero testified that Todd was a friend of his and that Lawrence tried to break up the fight when he saw that defendant was hitting Todd (T. at 450, 453, 455, and 463). Lawrence confirmed that he had only sought to fight with Jerry Garza when he and his friends went into the field (T. at 450). When Lawrence and his friends walked out to fight, there were twenty to twenty-five people facing them across the field, some standing in the field and others on the sidewalk (T. at 450-51). Lawrence and Jerry were preparing to fight when someone threw a beer can at Cris and "it all broke out." Defendant ran to Cris, who was facing two people (T. at 451). Lawrence first saw Todd across the street, in the gutter, fighting with Cris and defendant (T. at 452). He never saw Todd with a weapon (T. at 452). He did see defendant with the shotgun in the field before the fighting started. Defendant loaded the gun when defendant saw Cris fighting and ran to help him (T. at 452-53). Lawrence saw defendant and Todd fighting on Todd's carport and saw defendant swing the gun at Todd (T. at 454). Lawrence thought Todd had stopped fighting when defendant swung the gun and it discharged (T. at 455 and 462-63).

Crisostomo Mendoza testified that he had gone into the field with Lawrence and the others as a back up (T. at 470). He saw defendant when "the man threw me a beer" and the fight

started (T. at 472). Cris did not see the gun at first, but then later saw it as defendant raised it into the air (T. at 473-74). After the gun was shown, the people facing defendant began running away (T. at 474 and 481). Cris did not see Todd, did not know Todd, and did not know if the person fighting defendant was the person who was shot (T. at 474-75). Cris testified:

> Q [By Mr. Phillips] And do you know who Todd is?
> A No, sir.
> Q Do you know the person who got shot?
> A No, sir.
> Q Okay. Did you see the person Danny [defendant] was fighting with?
> A Yes, sir.
> Q And do you know if that was the person who got shot?
> A I don't know, sir.
> Q Did you see anyone with a knife then when Danny was fighting?
> A Yes, sir.
> Q Who?
> A I saw some sharp object, you know, Todd starting to swing to Danny and Danny, you know, tried to swing the gun to some guys, you know.
>
> . . .
>
> Q Could you see, you said, a sharp thing? What did you say?
> A Sharp object.
> Q Sharp -- do you know if it was a knife or not?
> A I'm not sure, you know.
> Q A set of keys maybe?
> A No. He tried to swing, you know. I don't know.

(T. at 474-75). Cris did not know if the man who was shot was the same man that had the sharp object (T. at 477 and 483).

Defendant testified that he did not know Todd Salazar and had nothing against him; however, when he saw Todd that evening, he thought Todd did not look like himself (T. at 493 and

504). In the early evening, the Lucero brothers, Ranaldo Hain, Cris Mendoza and defendant's "lady" were all at defendant's house, drinking and talking (T. at 492-93). Defendant was inside the house when Jerry and Jaime drove by, but he did hear yelling from outside (T. at 494). He eventually stepped outside and saw his four friends walking across the field toward a group of about ten people on the opposite sidewalk (T. at 495-96). Defendant did not see any weapons with his friends but saw a knife and a baseball bat in the other group (T. at 495 and 497). Defendant went back into his room and took out his sawed-off shotgun and one shell (T. at 497-98 and 500-501). He said that he took the gun out to stop the fight and scare the others away; however, he admits that he carried the gun behind his body as he walked out of his house and followed his friends into the field (T. at 501 and 506).

When defendant got up to his friends, they stood only a short distance from the other ten people (T. at 501). Defendant saw Todd standing with second group of ten people who had gathered at some point (T. at 501-502). The people who had gathered were neighborhood people (T. at 521). Todd, whom defendant did not even know, was "yelling and saying some bad words" (T. at 502). Defendant thought Todd was really drunk (T. at 504). Defendant's attention was drawn to Todd and defendant was never aware that a beer can had been thrown at Cris. Defendant saw his friends run toward the other group, and he ran too (T. at 505). All this time, defendant held the gun behind him. When asked, "[I]f you're holding the gun that way, how can

you stop the fight or scare everybody away if you're hiding the gun?" (T. at 506). Defendant responded:

> A Okay. I didn't -- I didn't hide the gun. The gun is really showing about that much and that you can see it.
> Q [By Mr. Phillips] Well, why is it behind you at all?
> A I don't -- I really don't know, but -- I just don't know why --why it's in my -- behind my back, but the thing that I know, it's in my back and it's showing about that much and they can see it.
> Q Okay. Then what do you do with it?
> A Okay. When -- when the fight was starting -- when the fight was starting I pull it -- I pull it and I point it -- I point it in the air.

(T. at 506-507 and 528). When defendant pulled the gun into view, someone yelled, "He's got a gun," and the crowd began to run away (T. at 507 and 531). Defendant loaded the gun when the person with Todd kicked defendant in the knee (T. at 507-508).

Defendant advanced toward the sidewalk where the opposing group of people had been and loaded the gun as the boys were running away (T. at 532-33). Cris ran toward Todd to chase him and defendant followed (T. at 535-36). Defendant said that he and Cris fought with Todd as they moved across the street to Todd's carport (T. at 540). Defendant swung the gun at Todd because Todd was swinging at him with a butterfly knife which had a six inch blade and a six inch handle (T. at 512 and 537). Todd never struck defendant with the knife, but defendant struck Todd with the shotgun (T. at 513-15, and 541-44). Defendant thought that Todd was really drunk, which explained why he continued to fight against defendant who carried the shotgun (T. at 543). When defendant hit Todd with the gun, Todd turned; defendant

swung the gun again and it fired (T. at 515, 545 and 549). Defendant had said in his statement to police that he fired from about five feet away; at trial, he testified that he was close enough to Todd to strike him with the gun (T. at 548-49).

On rebuttal, James Gaskill from the Weber State Crime Lab testified that he conducted test firings of sawed-off shotguns with barrel lengths ranging from eighteen to twenty-six inches (T. at 569-70). These tests demonstrated that the distance from the gun muzzle to Todd was two to three feet when the gun was fired (T. at 570). The position of the body and the angle of the wound and the trajectory indicated that the shot came from on the carport or from out on the lawn a foot or two (T. at 572).

Todd and Natalie did not have any guns and the only knife located in the house was a paring knife (T. at 106). When Natalie returned to the house the day after the shooting, she found the paring knife where she had left it in the kitchen sink on Friday (T. at 113). She also found a blanket and pillow on the couch where Todd had been sleeping, and a plate with a jalapeno pepper and salt on the table in front of the couch (T. at 110). Next to the plate was a can of beer which had been opened but was still full (T. at 113). In the kitchen was a full bowl of spaghetti on the kitchen counter (T. at 110).

SUMMARY OF ARGUMENT

The trial court's failure to give a Telfaire-Long eyewitness identification jury instruction was not plain error. That instruction is mandated when the identification of the

perpetrator is at issue; it is not applicable to the present case. Defendant admitted to police and testified at trial that he was the one who shot Todd Salazar. An eyewitness identification instruction, such as that dictated by State v. Long, 721 P.2d 483 (Utah 1986), was not appropriate; consequently it was not error, let alone plain error, for the court not to have given that instruction. Other instructions given sufficiently advised the jury of the law regarding the credibility of witnesses and their ability to perceive and correctly recall the events surrounding the shooting.

Defendant's trial counsel did not provide ineffective assistance. Because the eyewitness identification instruction from Long was not applicable to this case, it was not deficient performance for counsel not to have requested the instruction. Neither was defendant prejudiced when the instruction was not requested. He admitted shooting the victim; his defense was that the gun fired accidentally, or that he was acting in self-defense. A Long instruction would not have altered the outcome of the trial.

Trial counsel was also not ineffective for failure to object to jury instruction no. 10. That instruction was a correct statement of the law and counsel's performance cannot be deficient for failing to object to a correct instruction. Even if the instruction had been erroneous, defendant was not prejudiced by it. The credible evidence was that defendant shot Todd in the back from a distance of approximately five feet. The credible evidence also demonstrates that the victim was not

involved in the fighting until defendant and one of his friends entered the victim's property and attacked him. Todd was unarmed and trying to escape defendant's attack when he was shot. A jury instruction which parroted the statute regarding self-defense would not have changed the outcome of this trial.

The last ineffectiveness claim is also without merit. Counsel did not, as defendant now claims, abandon his theory of the case mid-trial. Based on defendant's own testimony, he either accidentally shot Todd, or shot him in self-defense. While it is not totally clear what theory of the case defense counsel supposedly abandoned, it appears that the theory defendant now claims was that the victim was killed as part of a gang war. As the trial court determined, the fact that Garza or Gomez may have been part of a Hispanic gang was not material if defendant was not aware of the gang affiliation. When defendant's counsel became aware that defendant could not testify whether he knew of a gang association at the time of the shooting, counsel properly did not pursue that avenue. Again, defendant was not prejudiced even if his counsel's trial actions were deficient. There was no evidence that the victim was part of a gang; in fact, the evidence supports the opposite conclusion. If defendant was fearful of a gang affiliation, that fact lost its impact when it became clear that defendant chased the supposed gang members across the street with a shotgun. When defendant attacked Todd Salazar, whose affiliation with the alleged gang was not demonstrated, in Todd's own yard, then shot Todd in the back as he was trying to flee, any alleged fear of a gang was irrelevant.

Finally, the trial court did not abuse its discretion when it refused to admit testimony that defendant's home had been set on fire two days after the shooting. That evidence was irrelevant to the issues of the homicide. At most, it bolstered defendant's testimony as to why he ran away after the shooting. That testimony did not need bolstering, as the jury could accept that defendant ran because he was afraid and confused. The evidence of the fire clearly did not justify the shooting itself.

ARGUMENT

POINT I

IT WAS NOT ERROR FOR TRIAL COUNSEL TO NOT REQUEST, AND THE TRIAL COURT NOT TO GIVE, AN EYEWITNESS IDENTIFICATION JURY INSTRUCTION.

Defendant's first claim of error is that it was manifest error for the trial court not to give an eyewitness identification jury instruction pursuant to State v. Long, 721 P.2d 483 (Utah 1986). As a corollary, he alludes to his second claim of error, i.e., trial counsel provided ineffective assistance for failing to request such an instruction. That second claim will be addressed in Point II.

When an issue is not properly preserved at the trial level, an appellate court may nonetheless address the issue under the plain error doctrine. This is provided for by rule in the context of jury instructions. Utah R. Crim. P. 19(c) (1990). In State v. Verde, 770 P.2d 116 (Utah 1989), the Utah Supreme Court said:

> [When] faced with a claim that a particular assertion of instructional error not raised at trial should be considered on appeal because failure to do so would result

> in manifest injustice under Utah Rule of Criminal Procedure 19(c), we will determine whether to review such a claim of error under the same standard we use when determining the presence of plain error under Utah Rule of Evidence 103(d).

770 P.2d at 122. In State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, Eldredge v. Utah, 110 S.Ct. 62 (1989), the Utah Supreme Court, construing rule 103(d), Utah Rules of Evidence, stated:

> The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. . . . The second and somewhat interrelated requirement for a finding of plain error is that the error affect the substantial rights of the accused, i.e., that the error be harmful.

773 P.2d at 35 (citations and footnote omitted). Under this test, the trial court's failure to give an eyewitness identification instruction was not plain error. Such an instruction was not applicable to this case because defendant's identification was not an issue.

The Utah Supreme Court, in State v. Long, directed:

> that in cases tried from this date forward, trial courts shall give such a[Telfaire] instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.

721 P.2d at 492 (emphasis added). The instruction mandated by the Court is patterned after the case of United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). The Telfaire case addressed the "need for a special instruction on the key issue of identification," and cited a series of United States Supreme Court cases "focusing on the very real danger of mistaken

identification as a threat to justice." 469 F.2d at 555 (emphasis added). The Long case also specifically applied to addressing "the weaknesses inherent in eyewitness identification." 721 P.2d at 490. All of the Utah cases at which a Telfaire-type instruction was sought, both pre- and post-Long, specifically describe the issue as one of eyewitness identification. See, e.g., State v. McCumber, 622 P.2d 353, 359 (Utah 1980); State v. Schaffer, 638 P.2d 1185, 1187 (Utah 1981); State v. Reedy, 681 P.2d 1251, 1253-54 (Utah 1984); State v. Malmrose, 649 P.2d 56, 61 (Utah 1982); State v. Watson, 684 P.2d 39, 40 (Utah 1984); State v. Bingham, 684 P.2d 43, 45 (Utah 1984); State v. Tucker, 709 P.2d 313, 316 (Utah 1985); State v. Booker, 709 P.2d 342, 346 (Utah 1985); State v. DeJesus, 712 P.2d 246, 247 (Utah 1985); State v. Jonas, 725 P.2d 1378, 1380-81 (Utah 1986); State v. Quevedo, 735 P.2d 51, 52 (Utah 1987); State v. Remington, 737 P.2d 168, 169 (Utah 1987); State v. Branch, 743 P.2d 1187, 1190 (Utah 1987), cert. denied, Branch v. Utah, 485 U.S. 1036 (1988); State v. Griffiths, 752 P.2d 879, 881-82 (Utah 1988); State v. Stilling, 770 P.2d 137, 143 (Utah 1989); State v. Bruce, 779 P.2d 646, 652-53 (Utah 1989).

Defendant now asks this Court to extend the Long holding to require a trial court to give the Long eyewitness identification instruction in all cases where eyewitnesses testify about the facts of the case. Such testimony does not trigger the need for a cautionary Long instruction if the identification of the perpetrator is not an issue. As the Utah Supreme Court has said:

> A criminal defendant is entitled to have a jury instructed on his theory of the case if there is any substantial evidence to justify such an instruction. . . . [A] defendant is not entitled to an instruction which is redundant or repetitive of principles enunciated in other instructions given to the jury. The principal points of defendant's proposed instruction dealt with the state's burden of proof and the factors to consider in weighing the testimony of an eye-witness. All of these factors were adequately dealt with in other instructions presented to the jury by the trial court. As a result, we cannot agree that the denial of the proposed instruction constituted reversible error.

State v. McCumber, 622 P.2d at 359.

In the present case, defendant apparently claims that a cautionary instruction should be given any time an eyewitness testifies, whether the issue is one of identification or not. As is clear from the testimony given in the present case, different people perceive the same events differently. It may also be that the perception is the same, but, for whatever reason, a witness may testify falsely about what occurred. The end result is that a jury is given evidence which is contradictory. However, as the Utah Supreme Court said in State v. Buel, 700 P.2d 701 (Utah 1985):

> The fact that there was contradictory testimony, without more, is not grounds for reversal, State v. Watts, Utah 675 P.2d 566, 568 (1983). The conflicting evidence was before the jury, and it was the jury's responsibility to evaluate its significance. State v. Wulffenstein, Utah, 657 P.2d 289, 292 (1982), cert. denied, 460 U.S. 1044 . . . (1983).

700 P.2d at 703 (additional citations omitted). If a jury is properly instructed as how to evaluate conflicting testimony, a cautionary eyewitness identification instruction (in a non-identification case) is not required.

In the case now before the Court, the jury was fully instructed as to its responsibility to determine the credibility of the witnesses and to reconcile conflicting evidence (R. at 73, 88, 89, and 91; copies of these instructions are attached as Addendum A). A cautionary eyewitness identification instruction was not applicable to this case. Defendant reported to the police station a few hours after the shooting and admitted that he was the one who fired the shot (T. at 307 and 548). Defendant also testified at trial that he was the one who fired the fatal shot (T. at 515, 545, and 548-49). Clearly, identification of the perpetrator was not an issue in this case. Accordingly, the Long eyewitness identification instruction was not applicable and it was not plain error for the trial court to not give the instruction.

POINT II

TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE.

Defendant contends that his trial counsel provided ineffective assistance on three bases: 1) Counsel failed to request a Long eyewitness identification instruction; 2) Counsel failed to object to jury instruction no. 10; and 3) Counsel abandoned his theory of the case at mid-trial because counsel had failed to adequately investigate this case before trial.

This Court addressed the issue of ineffective assistance of counsel in State v. Pursifell, 746 P.2d 270 (Utah Ct. App. 1987), in which it said:

> In Strickland v. Washington, 466 U.S. 668 . . . (1984), the United States Supreme Court established the standard for determining

> claims of ineffective assistance of counsel at trial. To prevail, the defendant must demonstrate, first, that counsel's representation fell below an objective standard of reasonable professional judgment, and second, that counsel's performance prejudiced the defendant. Id. at 690 . . . . The Utah Supreme Court has adopted and interpreted the Strickland standard for determining ineffective assistance claims. See, e.g., State v. Frame, 723 P.2d 401 (Utah 1986).

746 P.2d at 275 (parallel citations omitted). Interpreting the test from Strickland v. Washington, 466 U.S. 668 (1984), the Utah Supreme Court said:

> Defendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance.
>
> . . .
>
> Furthermore, any deficiency must be prejudicial to defendant. . . . To be found sufficiently prejudicial, defendant must affirmatively show that a "reasonable probability" exists that, but for counsel's error, the result would have been different. We have defined "reasonable probability" as that sufficient to undermine confidence in the reliability of the verdict.

State v. Frame 723 P.2d 401, 405 (Utah 1986) (footnote omitted). Applying this test to the present case, it is clear that defendant has not demonstrated that his counsel's performance was defective or that defendant was prejudiced by that performance.

A. Counsel Was Not Deficient for Failure to Request an Eyewitness Identification Instruction.

As noted in Point I, an eyewitness identification instruction was not applicable to the present case because defendant's identification as the perpetrator was not an issue. Since the instruction was not applicable, trial counsel's

performance was not deficient for failing to request the instruction.

B. Trial Counsel Was Not Ineffective For Failing to Object to Jury Instruction No. 10.

Defendant's next contention is that his trial counsel provided ineffective assistance when counsel failed to object to jury instruction no. 10. In passing, defendant also alleges that giving instruction no. 10 was plain error; however, defendant does not analyze this issue under the plain error doctrine. Utah Rule of Criminal Procedure 19(c) reads:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

Although defendant's trial counsel did not object to instruction no. 10, defendant could have now challenged the instruction under rule 19(c). However, it was not error for the court to use instruction no. 10, because the instruction was not a misstatement of the law. Even if it were error, under the test cited in State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, Eldredge v. Utah, 110 S.Ct. 62 (1989), as discussed in Point I, the error was not plain, nor was it harmful. Since the instruction was not a misstatement of the law, it was not plain that giving the instruction was error. As will be further developed below, the instruction, if error, was harmless at best.

In general,

> [t]he trial court has a duty to instruct the jury on the law applicable to the facts of the case. Encompassed in this duty is the right of the defendant to have his theory of the case presented to the jury in a clear and understandable way.

State v. Potter, 627 P.2d 75, 78 (Utah 1981). While instructions are often couched in statutory language, it is not required that they be so. As the Utah Supreme Court said in State v. Clayton, 646 P.2d 723 (Utah 1982):

> [I]nstructions need not be given with any particular words or phrases. Rather this Court has warned that care must be taken ". . . to use language which the jury would understand . . . ." State v. Garcia, 11 Utah 2d 67, 71, 355 P.2d 57, 60 (1960)[cert. denied, Garcia v. Utah, 366 U.S. 970 (1961)].

646 P.2d at 725. More recently, the Court said:

> Instructions generally ought to be drafted with a view to assisting the jury to understand the issues they have to decide. Too often instructions simply repeat arid, dense statutory language that the trial judge does not relate concretely to the issues in a case.

State v. Standiford, 769 P.2d 254, 266 (Utah 1988). The standard for review of the wording of jury instructions is whether the trial court abused its discretion. State v. Aly, 782 P.2d 549, 550 (Utah Ct. App. 1989). The choice of which jury instruction the trial court gives is a legal conclusion which is reviewed under a correctness standard. In State v. Mitchell, 779 P.2d 1116 (Utah 1989), the Utah Supreme Court said:

> [W]e accord [a] trial court's legal conclusion no particular deference on review and instead appraise it for correctness.

779 P.2d at 1123 (citation omitted).

The analysis of the propriety of a certain instruction does not end with a finding that the instruction was erroneous.

> [A] criminal conviction is not reversed because of an erroneous jury instruction unless the error is of such gravity that it could cause substantial prejudice to defendant's rights. A reasonable probability of a more favorable result for defendant in the absence of such error must exist.

State v. Montague, 671 P.2d 187, 190 (Utah 1983). Thus, the harmless error standard is applied if a court determines that an instruction given was incorrect.

In defendant's brief, he titles this issue as one of ineffective assistance and of plain error; however, he only analyzes the issue as ineffective assistance. Under this analysis, if the jury was properly instructed or if an erroneous instruction did not prejudice defendant, trial counsel's failure to object to the instruction was not ineffective assistance.

On the last day of trial, defense counsel proposed two jury instructions, one regarding defense of persons or property, and one regarding use of force in defense of persons which is virtually identical to Utah Code Ann. § 76-2-402 (1990) (R. at 97-100). On the first day of trial, the State submitted several proposed instructions (R. at 101-106). One of these instructions was given as instruction no. 10 (R. at 102). Defendant's theory that he acted in defense of himself or another was contained in instruction no. 13, which reads:

> Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed when the actor's conduct is in defense of persons or property under the circumstances described as follows:

> A person is justified in threatening or in using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or to a third person or to prevent the commission of a forcible felony.
>
> A person is not justified in using force under the circumstances listed above if he initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant.

(R. at 85). This instruction is a virtual restatement of Utah Code Ann. § 76-2-402(1) and (2)(a).[1] It is also virtually

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[1] That statute reads, in pertinent part:

> (1) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defendant himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony.
>
> (2) A person is not justified in using force under the circumstances specified in paragraph (1) of this section if he:
>
> (a) Initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant; or
>
> (b) Is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or
>
> (c) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other

identical to the first three paragraphs of defendant's proposed jury instruction (R. at 99).

Instruction no. 10 was requested by the State, and reads:

> You are instructed that in any prosecution for criminal homicide it shall be no defense to the prosecution that the defendant was a party to any duel, mutual combat, or other consenual [sic] altercation, if during the course of the duel, combat, or altercation any deadly weapon was used.

(R. at 81 and 102). Defendant complains that this instruction is a misstatement of the law because it does not parrot the language of Utah Code Ann. § 76-2-402(2)(c).

Jury instructions do not have to be couched in the exact language of a statute. State v. Standiford, 769 P.2d 254, 266 (Utah 1988). The trial court is obligated to give a correct statement of the applicable law to the jury. Id. at 264. Jury instruction no. 10 appears to come from statutory and case law that preceded the current criminal code; this case law has never been overturned. The law of justification in the context of a homicide once provided:

> Homicide is excusable in either of the following cases:
> (1) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution and without any unlawful intent.
> (2) When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation or upon a sudden combat, when no undue advantage is

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[1] Cont. person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

> taken nor any dangerous weapon used and when the killing is not done in a cruel or unusual manner.

State v. Johnson, 112 Utah 130, 185 P.2d 738, 741 (1947) (quoting Utah Code Ann. § 103-28-8 (1943)). In the Johnson case, the Utah Supreme Court quoted the definition of "combat" as: "A fight, a *contest, a struggle for supremacy, a duel* . . .." *185 P.2d at* 742 (quoting Webster's New International Dictionary, Second Edition). It appears, then, that instruction no. 10 came from Utah law as it read prior to the present statute, and from the Johnson case as it interpreted a former statute.

Although the current statute does not use the same language as the previous statute, the current statute encompasses the same theory. Instead of couching the justification in the use of a deadly weapon during the course of mutual combat, the current statute uses broader terms. The present statute reads, in pertinent part:

> [A] person is justified in using force which is intended or likely to cause death or serious bodily injury [i.e., a deadly weapon] only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself[.]
>
> (2) A person is not justified in using force under the circumstances specified in paragraph (1) of this section if he:
>
> . . .
>
> (c) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

Utah Code Ann. § 76-2-402. Under present law, use of a deadly weapon is not justified when defendant was the aggressor or engaged in combat by agreement (mutual combat). This is the law as stated in instruction no. 10.

Present law adds a qualifier to that statement of the law, which is missing from instruction no. 10. However, defendant has not argued that the lack of that qualifier was error; he has only argued that the language about use of a deadly weapon in mutual combat not being a defense was a misstatement of the law (Brief of Appellant [hereinafter Br. of App.] at 19-20). As noted above, that language is included in the broader language of the present statute, and is not error. Furthermore, there was no evidence adduced at trial which would support giving the qualifying language as an instruction. As noted above, "[t]he trial court has a duty to instruct the jury on the law applicable to the facts of the case." Potter, 627 P.2d at 78 (emphasis added). Since the facts of the case did not support an instruction about defendant withdrawing from a fight, the court had no duty to instruct regarding withdrawal. State v. Moritzsky, 771 P.2d 688, 692 (Utah Ct. App. 1989).

Since instruction no. 10 was not erroneous, especially when read in conjunction with instruction no. 13, it was not deficient performance for defendant's trial counsel not to object to the court giving that instruction.

C. Counsel's Conduct of Defendant's Case Did Not Deny Defendant Effective Assistance.

Defendant argues that his counsel provided ineffective assistance when his counsel failed to investigate the case

properly prior to trial, and subsequently abandoned his theory of the case in mid-trial. Defendant does not explain with specificity what investigation was not done, or how a different investigation would have changed the outcome of his trial. The main thrust of his argument was that his counsel began the trial focusing on supposed gang associations between the victim and Garza and Gomez and their friends, on one side, and defendant and his friends on the other side. This was somehow tied to defense counsel's statement regarding abandonment of evidence of defendant's state of mind. It is also somehow tied to a claimed failure by counsel in applying the rules of evidence to provide foundation for entering evidence of the alleged gang associations.

The right to the effective assistance of counsel is based on the right to a fair trial. Strickland v. Washington, 466 U.S. 668, 686 (1984). The inquiry as to whether counsel's performance was deficient "must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. As the United States Supreme Court said:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
>
> . . .
>
> Judicial scrutiny of counsel's performance must be highly deferential.

. . .

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 688-89 (citations omitted).

The actions of trial counsel now complained of by defendant did not fall below the standard of reasonable professional assistance. Whether Todd Salazar belonged to a Chicano group while defendant belonged to a Philippino group is not material to the outcome of this case. If defense counsel began the trial on the premise that defendant feared for his life because the victim belonged to a rival gang, that fact is not clear. Counsel's opening statement, in pertinent part, reads:

> Counsel [for the State] told you about these two groups. I think she neglected to tell you that the evidence will be that with Mr. Pascual and his friends there were five of them. The other group, little group she refers to, the evidence will be there was 25 or 27.
>
> She neglects to tell you that Mr. Garza or Mr. Gomez is the president of the Central City Cholos. She neglects to tell you that there were knives and guns and baseball bats in the 27 people that came just to watch the fight and to protect the back of the parties involved.
>
> . . .
>
> Other people observe a confrontation between Danilo and the other fellows and the Chicanos, the Central City Cholo Group, so it isn't a matter of walking on the scene.
>
> . . .
>
> Counsel will suggest to you that he's [the victim] kind of an innocent bystander, and I

> suggest to you he was swept into this gang fight as he came out. I don't know if he belonged to the gang or not, but Danilo's sitting at his house on his porch with a lady he lives with and doesn't have anything against any of these people except as swept into a rumble with a disproportionate number of people who are armed and with weapons.

(T. at 73-74, 76 and 77-78). Nothing in this opening statement suggests that the mention of a possible gang affiliation had any other purpose than to prejudice the jury against the victim and the State's witnesses. Defense counsel did not propose a theory to the jury that defendant was justified in shooting Todd Salazar because Todd belonged to a gang. Counsel's theory was that two groups of people faced each other to fight and defendant waved his gun around to scare away the group facing his friends. Counsel's theory was that Todd had a knife and fought with defendant (T. at 77). This theory was never abandoned by counsel.

Defendant's claim that his trial counsel abandoned his theory of the case contains a misleading partial quote from the transcript (Br. of App. at 22-23). At the conclusion of opening statements, the prosecution objected to defense counsel's allusion to gang affiliations (T. at 79). After some discussion, counsel and the court determined that evidence of such an affiliation would be appropriate if the proper foundation were laid, and if there was a showing that defendant was aware of the affiliation (T. at 81). At the close of the State's case, the prosecutor again raised the issue of defendant introducing evidence of a gang affiliation. At that point, defense counsel said:

> I'm not sure that I'm -- I've talked to my client further since the motion came up and he's not sure as of the time he advised -- I was advised these people -- that he's not sure of his state of mind at the time, so I'm not sure. I would be willing to abandon it rather than get into any further issue on it.

(T. at 404). Taken in the context of the earlier agreement that defendant would have to show that he was aware of the gang affiliation before it would be relevant, the above statement by counsel appears to be that defendant could not say that he knew of the affiliation at the time of the shooting. Since counsel could not establish that defendant knew of the affiliation (which was a prerequisite to admission of the evidence), counsel properly abandoned that line of evidence.

Neither was defendant prejudiced by the failure to introduce evidence of a gang affiliation. If, as it appears, defendant was not aware of the affiliation, he could not have been fearing that affiliation when he armed himself and chased his opponents across the street with a shotgun. If he did not know that Garza, Gomez and their friends were members of a gang, he could not argue that he feared for his life and the lives of his friends at the hands of the gang members. Defense counsel's decision not to pursue a line of testimony about the victim's possible gang affiliation was not only proper trial strategy, it was the only avenue open after defendant apparently was unable to tell when defendant knew of the supposed affiliation. Hence, it did not display ineffective assistance.

Defendant's use of the rules of evidence to argue that counsel was ineffective for not urging admission of gang

testimony based on those rules is unavailing. If defendant had no knowledge of the gang affiliation, evidence of it would not be probative of any issue at trial. If the evidence had no probative value, it was excludable under rule 402, Utah Rules of Evidence (1990) (quoted in Point III). Defendant's argument that two of the State's witnesses should have been questioned about their gang membership in order to establish a motive to misrepresent under rule 406, Utah Rules of Evidence, is without merit. Gang membership does not automatically make a person a liar; neither does it automatically establish bias or prejudice. Any remote probative value it might have had is completely outweighed by the prejudicial effect such evidence might have. Consequently, it would have been excluded under rule 403, Utah Rules of Evidence (1990) (quoted in Point III).

As part of trial strategy, defense counsel propounded theories of defense which were based on defendant's testimony, which presumably defendant had told counsel before trial. The theories were that defendant either fired on Todd in self-defense, or that the gun accidentally was cocked and then accidentally discharged, shooting Todd. Those theories were followed consistently at trial by counsel. The alleged gang affiliation evidence was not material to those theories. If defendant now feels that the theory should have been that he was protecting himself and his friends from a gang assault, defendant should have tailored his statements to his attorney and his testimony at trial along those lines. Such second-guessing of trial counsel's strategy, strategy which presumably was based on

what defendant told counsel before trial, is condemned under the Strickland-Frame test of effective assistance of counsel.

POINT III

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF A FIRE WHICH OCCURRED TWO DAYS AFTER THE HOMICIDE FOR WHICH DEFENDANT WAS CONVICTED.

Defendant claims that the trial court erred when it refused to allow defendant to introduce evidence of a fire in defendant's house which occurred two days after the shooting. Defendant has couched this argument in terms of rule 403, Utah Rules of Evidence, and in terms of a sixth amendment right to confront and cross-examine witnesses. However, the sixth amendment right is tempered by the rules of evidence. As defendant quoted in his brief:

> The Sixth Amendment right to confrontation requires only that the accused be permitted to introduce all relevant and admissible evidence.

State v. Johns, 615 P.2d 1260, 1264 (Utah 1980) (emphasis added). If the evidence sought on cross-examination is irrelevant or inadmissible under the rules of evidence, defendant had no sixth amendment right to introduce it.

It is well-settled that:

> [i]n reviewing evidentiary rulings made under rule 403, [an appellate court] will not overturn a trial court absent an abuse of discretion. State v. Cloud, 722 P.2d 750, 752 (Utah 1986); State v. Garcia, 663 P.2d 60, 64 (Utah 1983). To constitute an abuse of discretion, the error must have been harmful. See State v. Verde, 770 P.2d 116, 120 (Utah 1989).

State v. Larsen, 775 P.2d 415, 419 (Utah 1989). The pertinent rules of evidence read:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah R. Evid. 401 (1990) (emphasis added).

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Utah R. Evid. 402 (1990).

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403 (1990). "Unfair prejudice" in this context was defined in Terry v. Zions Co-Operative Mercantile Institution, 605 P.2d 314 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Co., Inc., 678 P.2d 298 (Utah 1984), as:

> Evidence is unfairly prejudicial in this context if it has a tendency to influence the outcome of the trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case.

605 P.2d at 323, n. 31 (citation omitted).

In the present case, the trial court did not abuse its discretion by refusing to allow introduction of evidence of a fire at defendant's house some two days after the shooting. That evidence had minimal relevance at best, and the trial court was

correct in ruling that its minimal relevance was substantially outweighed by its danger of unfair prejudice, confusion of the issues, or misleading the jury.

Defendant sought to introduce evidence of the fire, not, as he states in his brief, through an officer with knowledge of the fire, but through an officer who testified that he only knew about the fire from what he had read in the newspapers (Br. of App. at 26 and T. at 311; the transcript page is attached as Addendum B). During a subsequent recess, the admissibility of the fire evidence was argued, along with other admissibility issues (T. at 314-17 and 323; attached as Addendum B). The prosecutor argued that the fire was irrelevant, considering that it had occurred two days after the shooting, and at a time that defendant was incarcerated (T. at 314-15). There was no evidence that the fire was set by anyone associated with the victim, and it was misleading to imply that defendant left the scene of the shooting because of the fire (T. at 315). Defense counsel responded that evidence of the fire supported the defense theory that defendant fled the scene out of fear of retaliation (T. at 315). The court responded that defendant was entitled to explain why he left, and defendant subsequently testified that he left because he was fearful of retaliation (T. at 315, 516-17, and 552-53). But, as the court said, testimony of a fire two days later may have substantiated, somewhat, defendant's fear; however, that probative value was "somewhat limited." (T. at 315-16). After discussion of other issues, the court said:

> I've ruled the fire is irrelevant. It may have some limited relevance, but it seems to

> me that -- the possible prejudicial value outweighs its relevance and I'm going to grant a motion in limine not to discuss the fire from this point on.

(T. at 323; attached as Addendum B).

This ruling was not an abuse of discretion. There is no claim that defendant shot Todd because he feared retaliation, and that that fear was then justified by the subsequent fire. The claim is only that the fire would somehow explain defendant's flight from the shooting. That flight was fully explained by defendant when he testified that he fled because he was afraid and because he was confused (T. at 516-17 and 552-53). The jury could easily accept that explanation of defendant's state of mind after the shooting without the additional testimony about a fire set to his house two days later, while he was still in jail. The attempt to elicit sympathy for defendant because his house was set afire, and to imply that Todd was an evil person whom defendant was justified in killing because Todd's associates later set the fire, is clearly asking the jury to base its decision about guilt on something other than the facts of the crime. The trial court correctly refused to allow the evidence.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY submitted this 9th day of July, 1990.

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Attorney General

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Randine Salerno and Gary L. Gale, Attorneys for defendant, 2568 Washington Blvd., Suite 205, Odgen, Utah 84401, this 9th day of July, 1990.

Charlene Barlow

ADDENDA

ADDENDUM A

INSTRUCTION NO. 3

You are to determine what witness to believe and what parts of their testimony you believe and what weight or value you place upon the testimony of the various witnesses. In making these determinations, you might like to consider some or all of the following:

1) the demeanor and deportment of the witness in the courtroom;

2) the witness' interest in the result of the trial;

3) any tendency to favor or disfavor one side or the other;

4) the probability or improbability of events having occurred the way the witness describes the events;

5) was the witness actually able to see or hear or otherwise perceive the things described;

6) can this witness now accurately recall the things the witness observed;

7) is the witness able to describe what he observed accurately and in a form that you can understand;

8) did the witness make earlier statements or expressions which are consistent or inconsistent with what is now being said;

9) does the witness speak the truth or not.

But whatever tests you use, the value of a witness' testimony is for you to determine.

INSTRUCTION NO. 16

The weight of the evidence is not to be determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater believability. You may find that the testimony of a smaller number of witnesses on one side is more worthy of belief than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 17

If you believe any witness has testified falsely as to any material fact in the case, you are at liberty to disregard the whole of the testimony of such witness. You are not bound to believe all that the witnesses may have testified to nor are you bound to believe any witness; you may believe one witness against many or many as against one. With this in mind, you are to judge what weight to give the testimony of the witnesses and to determine what the facts are.

INSTRUCTION NO. 19

The constitution and laws of this state prohibit the trial judge from making any comment about the witnesses or the evidence, and I am not allowed to assist you in determining your verdict.

Therefore, you are instructed that if during this trial I have said or done anything which has suggested that I favor the claims or position of either party, you are not to permit yourselves to be influenced by any such suggestion.

I have not intended to indicate any opinion as to which witnesses are, or are not, worthy of belief, nor which party should prevail. If any expression of mine has seemed to indicate an opinion relative to any of these matters, you must disregard it.

ADDENDUM B

MR. PHILLIPS: I think on the basis of that -- he's indicated his non-presence at the house and I think that goes to the reason he was not at the house, Your Honor.

THE COURT: Overruled.

Q (By Mr. Phillips) Was there a fire the next day in the house?

MS. KNOWLTON: Your Honor, I'm still going to object. It happened the next day. It's not at that particular point of time.

MR. PHILLIPS: I still think that goes to the feelings, the reason they vacated the house.

MS. KNOWLTON: This officer was not present during that.

THE COURT: I think the question was answered, but the material was objected to.

MR. PHILLIPS: Yes.

THE COURT: And I suppose if he doesn't know anything about the fire --

MR. PHILLIPS: And I didn't know if he said that. I thought his answer was at the time he was there earlier. I don't know if he went back. If he didn't, he didn't.

Q (By Mr. Phillips) Do you know anything about a fire?

A Just what I read in the newspaper.

available.

THE COURT: I see.

MR. RICHARDS: That will be the medical examiner.

THE COURT: Do you have other witnesses that might be called at this time?

MS. KNOWLTON: Yes, Your Honor, another officer.

MR. PHILLIPS: If we do go too fast I wouldn't mind calling my case and we could call them out of order.

THE COURT: Okay. I think that might be an appropriate thing to do, too.

All right. Let's take a short recess.

(WHEREUPON, at this time there was a recess, after which proceedings resumed in chambers with the Court and all counsel present, as follows:)

MR. RICHARDS: Your Honor, we wanted to talk to you for a few moments. We're concerned with the line of questioning that began with the last officer in regards to this fire that occurred at the Pascual residence.

The fire took place two days later on Monday morning. I don't see any relevancy in relating that fire to -- to Mr. Pascual running because it happened long after the time that he had been apprehended and placed in jail. In fact, he was probably in jail at

that time. We have no idea who started the fire, but to infer that for some reason the Salazar people are out to get him and that's the reason he's not turning himself in is, I think, a false impression and I'd like to get that straightened out now and not have it come out with the next officer.

MR. PHILLIPS: We intend to pursue that because that is one of the reasons he left. Counsel constantly refers to the fact he didn't go back to the scene of the shooting and that he wasn't at the house, and I think the volatile situation was the very reason. They introduce things in evidence and they then -- ask six or seven witnesses about it and I think I'm entitled to respond why he wasn't there and the fact that within two days there's an attempt to torch his house, his house is burned and threats are made I think responds to that.

THE COURT: I think the risk is, of course, that -- that the jury may be confused by that as going to the issue of whether he did or did not deal with what he's charged with doing. That would be the concern I have.

Now, obviously I think he's entitled to explain why he left the scene, but I don't think that -- I don't think the fire really has anything to do with that

other than it may in some respects substantiate the fact that he -- that his feelings were legitimate, but I fear that the prejudicial value from that may very well outweigh its probative value because its probative value is somewhat limited.

MR. PHILLIPS: I understand.

THE COURT: So I --

MR. PHILLIPS: And I'll abide with what Your Honor says, obviously, but I do feel like that is supportive of the very feelings he had.

THE COURT: He's entitled to express why he didn't come in and -- but I think probably the matter of the fire may very well be --

MR. PHILLIPS: I'm not sure it's any -- I'm not quarreling, but I would like it in the record.

I don't think it's any more prejudicial than interjecting the fact that this lady is pregnant, she had another baby and they're living together. Those things are emotional things to present to the jury and have absolutely no bearing as to did he or did he not commit the offense. And I'm sure she's going to argue that thing to the jury and it hamstrings me if I can't reply to these emotional things. If they want to abandon that argument --

MR. RICHARDS: I guess I don't see any tie-in

there.

MR. PHILLIPS: I think it's an attempt to relate emotional --

THE COURT: I think if you would have objected at the time I probably would have sustained the objection, but because I don't think it has any --

MR. PHILLIPS: Understand it puts me in a bad position if I object.

THE COURT: I'm going to rule in limine they can't argue that to the jury. In the same respect, I won't allow you to bring up the fire.

MR. PHILLIPS: I think that's fair.

MR. RICHARDS: We hadn't intended to argue that because she had a baby for some reason this guy's guilty. Is that what you're saying?

THE COURT: I think that was the implication. Right?

MR. PHILLIPS: (Shakes head up and down.)

MR. RICHARDS: We do intend to argue that he's not like the other people in the -- in the ruckus because here he's living at home with a girl that is in essence his common law wife, they have a family and he's in there watching television when all this happened which makes it unlikely he would be out in the middle of the fracas like these other kids were.

THE COURT: Yes.

MR. PHILLIPS: What's his nickname?

MS. KNOWLTON: Crewey.

MR. PHILLIPS: Crewey. You're right.

THE COURT: Crewey.

MR. RICHARDS: The issue we're here on is the fire.

THE COURT: I've ruled the fire is irrelevant. It may have some limited relevance, but it seems to me that -- the possible prejudicial value outweighs its relevance and I'm going to grant a motion in limine not to discuss the fire from this point on. I'm going to rule -- reserve any ruling concerning this issue of cocaine in the system until we -- until we are able to determine from the medical witness what the likely impact of that would be.

MR. PHILLIPS: Are you also limiting this pregnant mother routine as far as --

THE COURT: Oh, yeah. Yeah.

MR. RICHARDS: I have no intention of bringing that up.

THE COURT: Okay. All right.

MR. PHILLIPS: It just accidentally slipped into the case.

THE COURT: I think they're entitled to say